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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

UNITED STATES OF AMERICA,	)	CR 16-102-JD
	)	
Plaintiff,	)	MOTION TO SUPPRESS STATEMENTS
	)	
v.	)	Date: September 8, 2016
	)	Time: 10:30 a.m.
DUMAKA HAMMOND,	)	
	)	
Defendant.	)	
	)	
	)	

**TO: BRIAN STRETCH, UNITED STATES ATTORNEY; AND  
THOMAS R. GREEN, ASSISTANT UNITED STATES ATTORNEY:**

PLEASE TAKE NOTICE that the defendant DUAMAKA HAMMOND hereby moves this Court for an order suppressing the statements he gave to the FBI on July 17, 2015. This motion will be heard on September 8, 2016 at 10:30 a.m. in Courtroom 11, on the 19th Floor of the San Francisco Courthouse.

This motion is based on this notice and motion, the attached memorandum of points and authorities and accompanying exhibits, the United States Constitution, *Miranda v. Arizona*, 384 U.S. 436 (1966), *United States v. Craighead*, 539 F.3d 1073 (9th Cir. 2008), all other applicable constitutional, statutory and case authority and such evidence and argument that may be presented at the motion hearing.

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## **INTRODUCTION**

When seventeen different law enforcement agents from four different agencies—some of whom were armed—entered Mr. Hammond’s apartment on July 17, 2015 to execute a search warrant, he was a man trapped in his own home. As the lead FBI agent questioned Mr. Hammond without reading him his *Miranda* rights, Mr. Hammond had nowhere to go. Although the lead agent told Mr. Hammond he could leave, the facts and circumstances of the FBI’s presence in Mr. Hammond’s apartment gave a very different impression. “If a reasonable person is interrogated inside his own home and told he is ‘free to leave,’ where will he go? The library? The police station? He is already in the most constitutionally protected place on earth. To be ‘free’ to leave is a hollow right if the one place the suspect cannot go is his own home.” *United States v. Craighead*, 539 F.3d 1073, 1083 (9th Cir. 2008).

Mr. Hammond found himself in this precise dilemma. His home was dominated by law enforcement, as their overwhelming presence isolated Mr. Hammond and restrained his freedom of movement. The effect was to place Mr. Hammond in “custody,” triggering the FBI’s obligation under *Miranda v. Arizona*, 384 U.S. 436 (1966) to warn Mr. Hammond of his right to remain silent and have an attorney present before answering any questions. Since Mr. Hammond was not advised of his *Miranda* rights before being interrogated by the FBI, all of his oral and written statements must be suppressed.

## **STATEMENT OF FACTS**

The facts concerning the Playpen investigation and how the FBI ultimately obtained a search warrant for Mr. Hammond’s residence in Richmond are recounted in more detail in the previously filed motion to suppress the NIT warrant for violating Federal Rule of Criminal Procedure 41. *See* Doc. 19, Motion to Suppress NIT Warrant at p. 2-7. This motion incorporates the facts of that motion.

### **A. The FBI’s Investigation of Playpen and Search of 678 7th Street in Richmond.**

In September 2014 the FBI began investigating a child pornography website known as “Playpen,” which was accessible only on the Tor network. Doc. 19 at p. 2-3. The Tor network allows users and websites to operate on the Internet without revealing their location or other

1 identifying information. *Id.* at 2. In December 2014, the FBI learned the Playpen website was hosted  
2 on a server in North Carolina, and seized the server with a search warrant. Instead of shutting down  
3 Playpen, however, the FBI copied the information from the seized server, including the child  
4 pornography, onto a government-controlled server in Virginia in order to operate the site itself. *Id.*  
5 at p. 3.

6 In February 2015, the government obtained a search warrant from a magistrate judge in the  
7 Eastern District of Virginia to continue operating the Playpen site for thirty days. *Id.* at p. 3-5. To  
8 identify the anonymized visitors to the site, the government sought to deploy a Network Investigative  
9 Technique (“NIT”), specialized software surreptitiously installed onto the computers of visitors to  
10 the Playpen site which would cause individual computers to covertly send identifying information  
11 about the computers back to the FBI. Although permitted to deploy the NIT for thirty days, the  
12 government operated Playpen and deployed the NIT from February 20 to March 4, 2015, before  
13 shutting the operation down. *Id.*

14 Based on information obtained through the NIT, the government identified numerous IP  
15 addresses that visited the Playpen site during the time it was operated by the government. One of  
16 those IP address was associated with 678 7th Street in Richmond, which was ultimately determined  
17 to be Mr. Hammond’s residence. On July 16, 2015, FBI Special Agent Robert Basanez submitted  
18 an application and affidavit for a search warrant to Northern District of California Magistrate Judge  
19 Maria-Elena James, seeking authorization to search Mr. Hammond’s apartment.<sup>1</sup> Judge James  
20 signed the warrant that same day. *Id.* at p. 5-7.

21 **B. Execution of the Search Warrant and Mr. Hammond’s Interrogation.**

22 On July 17, 2015, the FBI went to Mr. Hammond’s apartment at 6:00 am to execute the  
23 search warrant. *See* Exhibit A, July 28, 2015 FBI 302 Report of Investigation. There were a total of  
24 seventeen law enforcement agents conducting the search of Mr. Hammond’s residence from four  
25 different law enforcement agencies: twelve FBI agents, two U.S. Postal Inspectors, one Contra Costa  
26 County District Attorney Senior Investigator, and two marked Richmond police department cars at

27 <sup>1</sup> After filing the motion to suppress the NIT warrant, counsel for Mr. Hammond realized that the  
28 motion incorrectly identified Mr. Hammond’s address as 678 8th Street; it should be 678 7th Street.

1 the scene of the search, presumably with at least one Richmond police officer accompanying each  
2 car. *Id.*

3 At the time the FBI knocked on Mr. Hammond's door, he was in the bathroom and was not  
4 wearing a shirt. Exhibit B, Declaration of Dumaka Hammond, at ¶ 3. He heard banging on the door  
5 and someone yelling "open up, open up, FBI search warrant." *Id.* When Mr. Hammond came out  
6 of the bathroom, the agents were entering the house and he saw at least one officer holding a gun.  
7 *Id.* at ¶ 4. He was taken to the front porch of the house where he saw the other occupants of the  
8 house—his mother Mary Smith-Hammond, his sister Chantel Toliver, and her 14 year old  
9 daughter—handcuffed on the porch. *Id.* at ¶¶ 2, 5. Mr. Hammond was handcuffed and taken outside  
10 to the front porch too. *Id.* at ¶ 5. After the agents did a five to ten minute protective sweep of the  
11 apartment, they led everyone back into the family room of the apartment. Officers took the handcuffs  
12 off of everyone except Mr. Hammond. *Id.* at ¶ 7. They then separated Mr. Hammond's mother and  
13 took her into a room where she was interviewed by FBI officers. *Id.* at ¶ 8. In the meantime, Mr.  
14 Hammond waited on a couch in the family room with his sister and niece. *Id.*

15 After a few more minutes, agents took Mr. Hammond into his bedroom to interrogate him.  
16 They removed the handcuffs and had Mr. Hammond sit on his bed which was located opposite the  
17 wall with the sole door into the room. *Id.* at ¶ 9. As Mr. Hammond sat on one end of the bed, Agent  
18 Basanez sat next to Mr. Hammond on the bed. *Id.* at ¶ 11. Two other FBI agents, with holstered  
19 firearms, stood with their backs towards the wall with the door into the bedroom, effectively blocking  
20 Mr. Hammond from leaving the room. *Id.* The door to the bedroom was closed. *Id.* at ¶ 10.

21 Agent Basanez began by telling Mr. Hammond "we really just want to talk to you, ask you a  
22 few questions, but I want you to make sure you understand that you don't have to [answer]  
23 questions." Exhibit C, Transcript of July 17, 2015 Interrogation of Dumaka Hammond at 2.<sup>2</sup> He  
24 elaborated that he was not under arrest and would not be arrested that day. *Id.* After Mr. Hammond  
25 explained that he needed to leave for work, Agent Basanez asked him "do you mind just talking to  
26 us real quickly" and Mr. Hammond agreed. *Id.* at 6. Agent Basanez explained that the government

27 <sup>2</sup> Mr. Hammond has not lodged the actual audio recording of the interrogation with Mr. Hammond  
28 but can do so if the Court wishes to review it.

1 would get his computer back to him and the questioning began. *Id.* Critically, Agent Basanez did  
2 not advise Mr. Hammond of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966) including that  
3 he had the right to remain silent, that anything he said could be used against him in court, that he had  
4 a right to have an attorney present with him during questioning and that an attorney could be  
5 appointed to represent him if he was indigent. *See* Exh. B at ¶ 12; Exh. C at 2, 6.

6 Agent Basanez's tone with Mr. Hammond was neither rude nor aggressive. But he clearly  
7 demonstrated to Mr. Hammond that he knew who he was. *See* Exh. B at ¶ 13. Agent Basanez knew  
8 Mr. Hammond worked in computers. *See* Exh. C at 8 ("And I think you're a network administrator,  
9 is that?"). He knew Mr. Hammond was registered as a sex offender and his past criminal history,  
10 including his jail sentence and county of conviction. *Id.* at 8 ("Based on your past history that kind  
11 of has an indication of why we're here. You're you know...conviction of child pornography"); *id.*  
12 at 9 ("I understand you're still registered sex offender, right?"); *id.* at 14 ("I thought you didn't serve  
13 time?"); *id.* at 15 ("Who arrested you the first time? Was it Santa Clara?").

14 Agent Basanez repeatedly confronted Mr. Hammond with the evidence the FBI had against  
15 him. Agent Basanez told Mr. Hammond "we found a website and we found your information on  
16 that website." Exh. C at 9. He elaborated, "the thing is that we know that your computer accessed  
17 a website that has child pornography. I mean, we know that. Otherwise we wouldn't be here." *Id.*  
18 at 10. He then told Mr. Hammond "I'll play the game with you. I would tell you the name of your  
19 PC." *Id.* at 11. He explained, "how would I know that?" and "I've never met you," before concluding  
20 "I've got your case file, man." *Id.* at 12. He continued: "we know when you went on this website  
21 and we know how long you spent on the website." *Id.* at 20. He told Mr. Hammond he knew the  
22 last time Mr. Hammond logged on to the website, knew how many hours he had spent on the site  
23 and "I even know what your username is." *Id.* at 21, 23, 24.

24 Agent Basanez encouraged Mr. Hammond to talk truthfully because "the more truthful you  
25 are the better it is for you in the long run, because what I'm going to do is I'm going to write a report,  
26 and you know, take my notes and write a report. And then you know, at the end of the day you know  
27 the people above me that make this final call, they're going to call me and say you know, what was  
28 this guy like? Was he honest, was he truthful? I'll be like the guy was straight up with me." *Id.* at

1 16-17. So Mr. Hammond answered all of the FBI's questions. The "quick" interview Mr. Hammond  
2 thought he was going to have with the agents before going to work turned into a 65 minute  
3 interrogation. He did not get his computer back; the FBI explained "we can't let you take the  
4 computer, because it's got possible child porn on it." *Id.* at 49. Agent Basanez suggested Mr.  
5 Hammond "call work and tell them that you lost it or something" and agreed with Mr. Hammond  
6 that he "might want to" call in sick to work that day. *Id.* at 50; Exh. B at ¶ 14. This interview took  
7 place while Mr. Hammond was not wearing a shirt. Exh. B at ¶ 15; Exh. C at 56.

8 After approximately 45 minutes, Agent Basanez told Mr. Hammond the FBI needed to finish  
9 searching his room, as well as Mr. Hammond's car outside. *Id.* at 56. They had Mr. Hammond put  
10 a shirt on and all left the room. *Id.* Agent Basanez told Mr. Hammond:

11 SPECIAL AGENT BASANEZ: So, I mean, you're obviously not a, going to be  
12 arrested, so if you need to go somewhere or you want to hang out, you know, the only  
thing is that we kind of, we want to get in and out real quick, so.

13 MR. HAMMOND: I'm going to stick around just to give you guys any assistance.

14 SPECIAL AGENT BASANEZ: Okay. We're just going to have somebody kind of  
15 hanging out with you just for our safety.

16 MR. HAMMOND: Okay.

17 *Id.* at 62. Mr. Hammond told the agents he wanted to smoke a cigar, and they escorted him outside.  
18 Exh. B at ¶ 17; Exh. C at 62-63. After getting a cigar from his car, Mr. Hammond sat on the steps  
19 of his front porch smoking while an agent stood at the bottom of the porch steps, blocking the gate  
20 to exit the apartment building. Exh. B at ¶ 17.

21 Finally, Agent Basanez told Mr. Hammond "I don't really offer this to everyone, but I'm  
22 offering it to you because you have been so truthful with us." Exh. C at 69. His offer was to have  
23 Mr. Hammond give a written statement so he could say "hey, look, you know, I did X, Y or Z and I  
24 feel bad about it and I'm sorry, and you know, explain like your side of the story and apologize"  
25 since a statement "goes a long way." *Id.* Mr. Hammond took Agent Basanez's offer and provided a  
26 written statement. *Id.* at 71-73; Exh. B at ¶ 18.

27 After the interrogation ended, Mr. Hammond waited on the couch in the family room with  
28 the rest of his family members until the FBI finished searching about an hour later. Exh. B at ¶ 19.



1 Mr. Hammond was not arrested that day or charged with any crime. Eight months later, a one count  
 2 indictment was filed on March 10, 2016, charging Mr. Hammond with possession of child  
 3 pornography in violation of 18 U.S.C. § 2252(a)(4)(B). He was arrested that same day and has been  
 4 in custody since.

### 5 ARGUMENT

6 The Fifth Amendment to the U.S. Constitution states that no person “shall be compelled in  
 7 any criminal case to be a witness against himself.” U.S. CONST. AMEND. V. It is well-known that in  
 8 order to safeguard this constitutional right, law enforcement must advise criminal suspects of their  
 9 right to remain silent, warn them that anything they say could be used against them in court, explain  
 10 they have the right to have an attorney present during question, and that if they cannot afford an  
 11 attorney one can be appointed at no cost to them before questioning. *Miranda v. Arizona*, 384 U.S.  
 12 436, 479 (1966).

13 *Miranda* warnings are required whenever a suspect is subjected to “custodial interrogation.”  
 14 A person is in “custody” when he has been “deprived of his freedom of action in any significant  
 15 way.” *Id.* at 444. That requires reviewing the totality of the circumstances to determine “whether a  
 16 reasonable person in those circumstances would ‘have felt he or she was not at liberty to terminate  
 17 the interrogation and leave.’” *United States v. Craighead*, 539 F.3d 1073, 1082 (9th Cir. 2008)  
 18 (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995)). “Interrogation” means either express  
 19 questioning or its functional equivalent reasonably likely to elicit an incriminating response from the  
 20 suspect. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

21 Here, there is no question that Mr. Hammond was “interrogated.” He was asked direct  
 22 questions by Agent Basanez and other FBI agents about whether he had used Tor and accessed  
 23 Playpen to view child pornography. The questioning lasted for more than an hour and was clearly  
 24 designed to—and did—elicit incriminating responses from Mr. Hammond, including a detailed  
 25 written confession at the end of the interrogation.

26 Therefore, the only question here is whether Mr. Hammond was in “custody” and needed to  
 27 be advised of his *Miranda* rights before being interrogated by the FBI. As explained below, the  
 28 answer is yes: Mr. Hammond was in “custody” notwithstanding the fact the interrogation took place

1 in his home. Because Mr. Hammond did not feel free to terminate the encounter with Agent Basanez,  
2 he should have been advised of his *Miranda* rights before speaking to the FBI. In the absence of  
3 *Miranda* warnings, his verbal and written statements to the FBI, including any signed consent forms  
4 and any evidence obtained as a result of any verbal or written consent, must be suppressed.

5 **A. Mr. Hammond Was in “Custody” When Interrogated by the FBI.**

6 The Ninth Circuit has noted the “analytical challenges” with applying *Miranda* safeguards—  
7 and determining whether a person is in “custody”—during an interrogation that takes place at a  
8 suspect’s home. A “reasonable person interrogated inside his own home may have a different  
9 understanding of whether he is truly free ‘to terminate the interrogation’ if his home is crawling with  
10 law enforcement agents conducting a warrant-approved search. He may not feel that he can  
11 successfully terminate the interrogation if he knows that he cannot empty his home of his  
12 interrogators until they have completed their search.” *Craighead*, 539 F.3d at 1083.

13 The Ninth Circuit in *Craighead* adopted a four factor test to help courts determine whether  
14 an interrogation that takes place inside the home is “custodial” and must be preceded by *Miranda*  
15 warnings. Court should consider “(1) the number of law enforcement personnel and whether they  
16 are armed; (2) whether the suspect was at any point restrained by physical force or by threats; (3)  
17 whether the suspect was isolated from others; and (4) whether the suspect was informed that he was  
18 free to leave or terminate the interview, and the context in which those statements were made.” *Id.*  
19 at 1084.

20 In *Craighead*, eight law enforcement officers representing three different agencies went to  
21 the defendant’s house at 8:40 in the morning to execute a warrant to search for child pornography.  
22 *Id.* at 1078. One of these officers said that two officers wanted to talk to the defendant; they “told  
23 him that he was not under arrest, that any statement he might make would be voluntary . . . that he  
24 would not be arrested that day regardless of what information he provided” and “that he was free to  
25 leave.” *Id.* They took the suspect to a storage room and closed the door so they could have a private  
26 conversation. *Id.* The agents questioned the defendant for approximately twenty to thirty minutes,  
27 “did not make any threats or promises to induce Craighead to speak,” and “did not use any force.”  
28 *Id.* at 1079. No *Miranda* warnings were given before the agents spoke with Craighead. At the end

1 of the interview, he was not arrested and the government did not indict Craighead until seven months  
2 later. *Id.* at 1079-80. The district court denied a motion to suppress, but the Ninth Circuit reversed.

3 Analyzing under the four factor test detailed above, the Ninth Circuit concluded Craighead  
4 was in “custody” at the time of the interrogation. It noted that although the agents told Craighead he  
5 was free to go, Craighead was nonetheless in “custody” because his “home had become a police-  
6 dominated atmosphere,” and he “reasonably believed that there was simply nowhere for him to go.”  
7 *Id.* at 1089. Since he was in custody, the absence of *Miranda* warnings meant that the interrogation  
8 should have been suppressed.

9 Mr. Hammond’s case is identical to the facts in *Craighead*. Under the four *Craighead* factors,  
10 it is clear Mr. Hammond was in “custody” and should have been informed of his *Miranda* rights.  
11 Since he was interrogated without being advised of these rights, his statements should be suppressed.

12 **1. Seventeen Law Enforcement Personnel from Four Different Agencies Created a**  
13 **Police Dominated Presence in Mr. Hammond’s Apartment.**

14 The Ninth Circuit in *Craighead* noted that “the presence of a large number of visibly armed  
15 law enforcement officers goes a long way towards making the suspect’s home a police-dominated  
16 atmosphere” for several reasons. 539 F.3d. at 1085. First, “they may fill the home such that there  
17 are no police-free rooms or spaces to which the suspect may retreat should he wish to terminate the  
18 interrogation.” *Id.* at 1084. Second, when law enforcement outnumber the suspect, he “may  
19 reasonably believe that, should he attempt to leave, he will be stopped by one of the many officers  
20 he will encounter on the way out.” *Id.* at 1084-85. Third, the person may believe “the large number  
21 of officers was brought for the purpose of preventing his departure.” *Id.* at 1085. And finally, “if  
22 the suspect sees the officers unholstering their weapons within his home, the suspect may reasonably  
23 believe that his home is no longer safe from the threat of police force.” *Id.* Thus, in *Craighead*, the  
24 presence of eight law enforcement officers from three different law enforcement agencies was an  
25 important fact in the Court’s conclusion that a reasonable person would feel his home was dominated  
26 by law enforcement who came “prepared for a confrontation.” *Id.*

27 Here, the number of law enforcement doubled that in *Craighead*. There were seventeen law  
28 enforcement agents, some of whom were visibly armed, that conducted the search of Mr.

1 Hammond's residence. The agents came from four different law enforcement agencies: twelve FBI  
2 agents, two U.S. Postal Inspectors, one Contra Costa County District Attorney Senior Investigator,  
3 and two marked Richmond police department cars (presumably with Richmond police officers). *See*  
4 Exh. A. The overwhelming law enforcement presence in Mr. Hammond's small three bedroom  
5 apartment clearly made it a "police-dominated atmosphere" that supports finding Mr. Hammond was  
6 in "custody." *Craighead*, 539 F.3d at 1085.

7 **2. Mr. Hammond Was Restrained By Handcuffs and Escorted at All Times.**

8 Regarding physical restraint, *Craighead* explained the relevant inquiry was "whether the  
9 suspect was *at any point* restrained, either by physical force or threats." *Craighead*, 539 F.3d at 1085  
10 (emphasis added). The court also explained that "[r]estraint amounting to custody may also be  
11 inferred where law enforcement officers permit the suspect to move around the house for brief  
12 periods but insist on escorting and monitoring him at all times." *Id.*; *see also United States v.*  
13 *Gladney*, 2009 WL 175157, \*7, (C.D. Cal. Jan. 23, 2009) (Whaley, D.J.) (defendant in custody at  
14 home even after handcuffs removed because "two FBI agents were guarding him at all times during  
15 the questioning").

16 In *Craighead* itself, the Court found that although Craighead was "not handcuffed or  
17 physically restrained," it was nonetheless reasonable for him "to believe he was under guard"  
18 because he was escorted to a back storage room, the door was closed and an armed detective was  
19 "leaning with his back to the door in such a way as to block Craighead's exit from the room."  
20 *Craighead*, 539 F.3d at 1086. Under these circumstances, "his freedom of action was restrained in  
21 a way that increased the likelihood that Craighead would succumb to police pressure to incriminate  
22 himself." *Id.* Critically, the Court credited Craighead's testimony that he was intimidated by the  
23 detective's presence because he "represents law enforcement" and was armed. *Id.*

24 Mr. Hammond's felt the same intimidation. He—along with his family members, including  
25 his fourteen year old niece—were handcuffed when the FBI entered the home to execute the search.  
26 Exh. B at ¶¶ 4-5, 13. Although the handcuffs were taken off for Mr. Hammond's family members  
27 after several minutes, Mr. Hammond remained handcuffed until the agents interrogated him in his  
28 bedroom. Mr. Hammond was not wearing a shirt and the interrogation took place behind closed

1 doors. *Id.* at ¶¶ 3, 10. At least two of the agents in the bedroom had holstered firearms visible to  
 2 Mr. Hammond. *Id.* at ¶ 11. Those same two agents leaned against the wall that contained Mr.  
 3 Hammond’s door, blocking him from leaving the room. *Id.* at ¶¶ 10-11. Agent Basanez, who was  
 4 Mr. Hammond’s primary interrogator, sat near Mr. Hammond’s bed and questioned him. *Id.* at ¶ 11.  
 5 The agents never left Mr. Hammond unsupervised and Agent Basanez told Mr. Hammond that  
 6 “we’re just going to have somebody kind of hanging out with you just for our safety.” Exh. C at 62.  
 7 This show of presence and control would intimidate any reasonable person, and especially Mr.  
 8 Hammond. After all, the agents told Mr. Hammond they knew he was a registered sex offender who  
 9 did not feel like he could leave without talking to the officers.

10 While there is nothing inherently wrong with law enforcement controlling a suspect and a  
 11 potential crime scene, there are consequences for that decision. The Ninth Circuit—quoting the First  
 12 Circuit—noted that although “physical control of the suspect will be necessary to preserve evidence  
 13 and protect the safety of the agents,” the correct course is to either “postpone the interrogation until  
 14 a non-custodial moment, or to Mirandize [the suspect],” which “would have protected both the  
 15 defendant’s constitutional rights and the officer’s legitimate law enforcement needs.” *Craighead*,  
 16 539 F.3d at 1086 (quoting *United States v. Mittel-Carey*, 493 F.3d 36, 40 (1st Cir. 2007) (quotations  
 17 omitted)); *see also United States v. Perez*, 2012 WL 2935657, \*3 (D. Guam Jul. 17, 2012) (Tydingco-  
 18 Gatewood, D.J.) (fact that officers needed to handcuff defendant to do a safety sweep “does not  
 19 lessen the tendency to make a reasonable person believe he is in custody.”). The agents’ legitimate  
 20 decision to restrain Mr. Hammond meant that he was in “custody.”

### 21 **3. Mr. Hammond Was Isolated From Family Members During Questioning.**

22 The Supreme Court in *Miranda* itself noted that “the principal psychological factor  
 23 contributing to a successful interrogation is privacy—being alone with the person under  
 24 interrogation.” *Miranda*, 384 U.S. at 449. Thus, isolation is not just “the crucial factor that would  
 25 tend to lead a suspect to feel compelled to provide self-incriminating statements,” but “one of the  
 26 distinguishing features of a custodial interrogation.” *Craighead*, 539 F.3d at 1086-87 (citing  
 27 *Miranda*, 384 U.S. at 445-46).

1 Here, there is no question Mr. Hammond was isolated from his family. Although initially  
 2 placed near his family, first in the front porch then in the family room, the agents eventually isolated  
 3 Mr. Hammond from his family members when they interrogated him. Exh. B at ¶¶ 5-9. First, his  
 4 mother was taken into her own room to be questioned behind closed doors. *Id.* at ¶ 8. Then Mr.  
 5 Hammond was separated from his sister and niece, who were sitting in the living room with Mr.  
 6 Hammond, when he was questioned in his bedroom. *Id.* at ¶¶ 8-9. The door of the bedroom was  
 7 closed and Mr. Hammond was alone with three other armed agents. *Id.* at 10-11. This supports a  
 8 finding that Mr. Hammond was in “custody.”

9 **4. Although Told He Could Leave, a Reasonable Person in Mr. Hammond’s**  
 10 **Position Would Not Have Felt Free to Leave.**

11 Although statements that a suspect are free to leave and will not be arrested suggest a person  
 12 is not in custody, the “mere recitation of the statement that the suspect is free to leave or terminate  
 13 the interview, however, does not render an interrogation non-custodial *per se*.” *Craighead*, 539 F.3d  
 14 at 1088. After all, *Miranda* is not concerned with “whether the suspect was *told* that he was free to  
 15 leave” but whether “a reasonable person [would] have *felt* he or she was not at liberty to terminate  
 16 the interrogation and leave.” *Id.* (quoting *Thompson*, 516 U.S. at 112) (quotations omitted). As one  
 17 district court has noted, “[j]ust because agents repeatedly used the magic words ‘you are not under  
 18 arrest’ and ‘you are free to leave’ [does] not make [a] gathering non-custodial.” *United States v.*  
 19 *Durazo*, 2014 WL 217895, \*9 (D. Ariz. Jan. 21, 2014) (Collins, D.J.). Instead, a reviewing court  
 20 must consider the agents’ “delivery of these statements within the context of the scene as a whole.”  
 21 *Craighead*, 539 F.3d at 1088.

22 In *Craighead*, the agents told the suspect that he was free to leave and would not be arrested  
 23 that day regardless of what the agents told him. Nonetheless, the Ninth Circuit found *Craighead*  
 24 could have reasonably believed he was not free to leave. That was because of the number and variety  
 25 of agents present in the house left *Craighead* with “doubt” as to whether the agent telling him he  
 26 could leave even had such authority. Plus, the statement was given in a room with a single door  
 27 blocked by an armed agent, while six other agents were searching the house. *Craighead*, 539 F.3d  
 28 at 1088-89. Finally, *Craighead* explained he did not want to leave the officers alone with his

1 belongings. *Id.*

2 Similarly here, notwithstanding the fact the agents *told* Mr. Hammond he was not under arrest  
3 and free to leave, he reasonably did not *feel* free to leave.<sup>3</sup> Mr. Hammond was not wearing a shirt  
4 during the interrogation. Exh. B at ¶¶ 3, 15. The most logical place for Mr. Hammond to go—  
5 work—was unavailable to him because the FBI had seized his computer, which he needed for his  
6 job. *Id.* at ¶ 14. The agents even advised him to call in sick, thus actively precluding him from going  
7 to one possible refuge from the FBI. *Id.*

8 Moreover, because the agents blocked him from leaving his room during the interrogation  
9 and told him they were going to escort him anywhere he went for their own safety, he could not  
10 reasonably believe he was truly free to go as he pleased. After all, he would have needed an officer's  
11 permission to go anywhere; had he actually got up and left, it is likely an officer would have stopped  
12 Mr. Hammond because Agent Basanez effectively told him he was a threat. *See* Exh. C at 62 (“We’re  
13 just going to have somebody kind of hanging out with you just for our safety.”); *see also United*  
14 *States v. Warras*, 2015 WL 6736981, \*10 (D. Nev. May 18, 2015) (Ferenbach, M.J.), *R. & R. adopted*  
15 20105 WL 6755275 (D. Nev. Nov. 4, 2015) (Dawson, D.J.) (escorting defendant at all times and  
16 telling him he could not move without permission or supervision meant defendant’s “right to leave”  
17 was conditioned and had defendant “exercised his right to leave freely (i.e., without requesting  
18 permission or supervision), he would have been stopped.”). He was not even free to do the simple  
19 act of getting a shirt on without being supervised: Mr. Hammond was not able to open a dresser or  
20 closet to get clothes until the officers searched and swept the closet or dresser. Ultimately, the  
21 overwhelming presence of the officers and the FBI’s request that Mr. Hammond be escorted  
22 throughout the apartment meant Mr. Hammond was deprived of “police-free rooms or spaces” where

23  
24 <sup>3</sup> Several judges, including one here in the Northern District of California, have lamented the practice  
25 of advising suspects that they are not under arrest in situations where no person could reasonably  
26 believe they were free to terminate the encounter “on the theory that these magic words would allow  
27 officers to keep questioning suspects without advising them of their *Miranda* rights, even if it is  
28 otherwise obvious that the suspects are in custody and therefore entitled to *Miranda*’s protective  
admonitions.” *United States v. Howard*, \_\_\_ F. Supp.3d \_\_\_, 2016 WL 97448, \*5 (N.D. Cal. Jan. 8,  
2016) (Chhabria, D.J.) (citing *Smith v. Clark*, 612 F. App’x 418, 424 (9th Cir. 2015) (Watford, J.,  
concurring) and *Smith v. Clark*, 804 F.3d 983, 986-87 (9th Cir. 2015) (W. Fletcher, J., dissenting  
from denial of rehearing en banc)).



1 he could retreat to during the search. *Craighead*, 539 F.3d at 1084.

2 Just because the agents questioned Mr. Hammond in a professional tone and were not  
 3 aggressive with him does not mean he was not in custody. “However calm in demeanor and normal  
 4 in tone, the officers were *ever present*” and that is enough to find a person is in custody for purposes  
 5 of *Miranda* if the home has become a police dominated atmosphere under the *Craighead* factors.  
 6 *United States v. Richardson*, 36 F. Supp.3d 120, 129 (D.D.C. 2014) (Jackson, D.J.); *see also United*  
 7 *States v. Salabye*, 623 F. Supp.2d 1010, 1013-14 (D. Ariz. 2009) (Campbell, D.J.) (while agent was  
 8 “calm and courteous, [he] was clearly in control of the situation” and defendant therefore in custody);  
 9 *Warras*, 2015 WL 6736981, \*13 (“The mere fact that Mr. Warras showed agents memorabilia or  
 10 made jokes is insufficient to conclude that his home was not police dominated.”).

11 **B. Since Mr. Hammond Was Subjected to Custodial Interrogation Without Being Advised**  
 12 **of His *Miranda* Rights, His Verbal and Written Statements Must be Suppressed.**

13 Considering all four of the *Craighead* factors, it is clear Mr. Hammond was in custody and  
 14 should have been advised of his *Miranda* rights before being interrogated. Numerous courts applying  
 15 *Craighead* to facts similar to the ones here have reached the same result. *See, e.g., Mittel-Carey*,  
 16 493 F.3d at 39-40 (defendant in “custody” at home when questioned in his bedroom for ninety  
 17 minutes to two hours after executing an early morning search, defendant was accompanied by agents  
 18 the entire time, and agents repeatedly told the defendant he should speak to the FBI because  
 19 “‘individuals that cooperated with investigations at the outset...tended to fare better if a deal was to  
 20 be had later on down the road.’”); *United States v. McKany*, \_\_\_ F. App’x \_\_\_, 2016 WL 2587540  
 21 (9th Cir. May 5, 2016) (unpublished) (defendant in custody at home when fourteen agents were  
 22 searching home, defendant was initially handcuffed and his movements were “closely monitored and  
 23 controlled”); *United States v. Clymer*, 524 F. App’x 354, 355-56 (9th Cir. 2013) (defendant in  
 24 custody at home when eleven officers from six different agencies executed search warrant and  
 25 defendant “was not permitted to move unrestrained through his home”); *United States v. Blanford*,  
 26 467 F. App’x 624, 625 (9th Cir. 2012) (unpublished) (presenting defendant with “substantial  
 27 evidence of his guilt” supported finding of in-home “custody” to require *Miranda* warnings); *see*  
 28 *also Durazo*, 2014 WL 217895, \*10 (defendant in custody at home when 30 agents from five



1 different agencies entered defendant's home in early morning and agents accompanied him  
2 everywhere he went during the search).

3 Since Mr. Hammond was subjected to custodial interrogation but not advised of his *Miranda*  
4 rights, all of his statements to the FBI—including his written confession—must be suppressed.  
5 *Miranda*, 384 U.S. at 492.

6 **CONCLUSION**

7 For the reasons stated above, Mr. Hammond was in “custody” when interrogated by the FBI  
8 on July 17, 2015. Since the agents did not advise Mr. Hammond of his *Miranda* rights, any verbal  
9 or written statement given by Mr. Hammond must be suppressed.

10  
11 DATED: August 4, 2016

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